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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1313

C. EMILY FRECCIA, a/k/a MRS. CLYDE BANKS; FRANK J. FRECCIA, a/k/a FRANK J. FRECCIA, SR.; FRANK A. DOEBERL and JOSEPH B. MASTOCCIOLO, a/k/a JOE MASTO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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C. EMILY FRECCIA, a/k/a MRS. CLYDE BANKS; FRANK J. FRECCIA, a/k/a FRANK J. FRECCIA, SR.; FRANK A. DOEBERL and JOSEPH B. MASTOCCIOLO, a/k/a JOE MASTO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, C. Emily Freccia, a/k/a Mrs. Clyde Banks; Frank J. Freccia, a/k/a Frank J. Freccia, Sr.; Frank A. Doeberl and Joseph B. Mastocciolo, a/k/a Joe Masto hereby petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered herein on March 26, 1969 denying their petition for rehearing on the decision rendered February 12, 1969 which affirmed on appeal the judgments of con-

viction made by Honorable William H. Timbers, Chief United States District Judge, District of Connecticut under date of January 23, 1967.

Opinions Below

The District Court filed no opinion.

The Court of Appeals filed no opinion on affirmance.

Statement

The judgment of the Court of Appeals is dated February 12, 1969, entered under the same date.

The Order of the Court of Appeals denying a petition for rehearing is dated March 26, 1969; the Order of the Court of Appeals denying so much of the petition as requested rehearing *en banc* is dated April 7, 1969.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Section 1254.

Questions Presented for Review

Were petitioners' Fifth and Sixth Amendment due process rights violated

a. By the Government's suppression of exculpatory evidence?

b. By false and misleading statements made by the Government's counsel to the trial court and jury?

c. By prejudicial comments and instructions by the trial court?

d. By the loose application of evidentiary rules?

e. By failure of the Government to prove Hodgkins disease is "fatal" as alleged in the indictment?

Constitutional and Statutory Provisions Involved

Amendment V, UNITED STATES CONSTITUTION:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compenation.

Amendment VI, UNITED STATES CONSTITUTION:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 18 UNITED STATES CODE, SECTION 1341:

> **§ 1341. Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out

to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

TITLE 18 UNITED CODE, SECTION 371:

§ 371: Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Statement of the Case

The indictment contained seventeen counts (one through seventeen) charging the petitioners with use of the mails to defraud banking institutions, car dealers and life insurance companies in violation of Title 18, United States Code, section 1341 and one count of conspiracy (count eighteen) in violation of Title 18, United States Code, Section 371.

During the trial, counts five and thirteen were dismissed pursuant to application by the government. After trial before Judge and Jury, verdicts of guilty were handed up to the court on the remaining counts.

On December 15, 1965, petitioners were indicted and charged with fraudulent misrepresentations to banking institutions and car dealers who, in reliance thereon, granted loans and sold cars to one Clyde Banks. Insurance on his life issued in each instance. Adequate collateral security was offered and accepted on each loan. It is charged that the petitioners concealed the material facts that Banks "had Hodgkins Disease, a fatal and incurable condition, . . ." (count one, Paragraph 6). Banks died on May 29, 1964 at the West Haven Veterans Hospital. He ". . . is named as a co-conspirator but not as a defendant herein, . . ." (count eighteen) with petitioners to perpetrate the frauds and use the mails to obtain the loans and cars described in counts one through seventeen.

The "scheme" sought to be proved by the government was an alleged arrangement whereby the defendant Doeberl misrepresented himself to be Clyde Banks at the various times and places of the transactions. Although the government had obtained a report from the handwriting analyst of the Chief Postal Inspector's office (Court exhibit 20 for identification), this report which found the signatures on the loan documents to be "very probably authentic" never got before the jury although it was made available to defense counsel during the trial. Neither side called the handwriting expert. Although the government's counsel had represented to the trial court and to defense counsel that the issue of forgery was not in the case, nevertheless he argued to the contrary in his summation.

The basis for federal jurisdiction are the alleged violations of Title 18 United States Code Sections 371 and 1341.

Argument

Parenthetical references are to pages in typewritten trial transcript.

POINT I

The decisions and judgment below appear to sanction such a departure from the constitutional requirements of due process as to call for the exercise of this Court's supervision.

(a)

The suppression of exculpatory evidence and the Trial Court's instructions thereon.

The government argued (Tr. p. 2488):

> "... they would take in an imposter and present him as the real man ...": and
>
> "They had no reason to suspect that Mr. Doeberl on many occasions was really Mr. Doeberl and not Clyde Banks." (Tr. p. 2493)

Doeberl and Banks resembled each other (Tr. p. 239). When shown photographs of both men, a government witness stated: "To someone who knows neither party it could be" (a close resemblance) (Tr. p. 1102). The government's bank witnesses on the question of identity were both conflicting and inconclusive. One was positive that Doeberl did not masquerade as Banks (Tr. p. 1111). Two admitted they had told postal authorities that this identification of Doeberl as the imposter was "qualified"; another was certain that "Doeberl is not the man who came to his branch representing himself to be Clyde Banks" (Tr. pp. 611, 1167); and another bank witness testified it was customary that the borrower sign the loan note in the presence of a representative of the lending bank (Tr. pp. 662, 1102).

In this posture of the government's proof, *the genuineness of Clyde Banks' signatures* on the loan documents made in the presence of bank officials became a most material element. If the signatures were genuine, then the government's "scheme" theory collapsed (Tr. p. 954). The prosecutor, recognizing this dilemma, injected the new element of *forgery* into his case over defense counsels' objections. The latter had relied upon the prosecutor's pretrial representations that there would be no claim of forgery (Tr. pp. 877, 936, 938), and in reliance upon the prosecutors' statements, had not prepared to meet handwriting expert testimony (Tr. pp. 936, 959).

Exhibit 20 for Identification is a six page thorough report made by the Document Analyst, Post Office Department, Office of the Inspector in Charge.

This government handwriting expert's report was reluctantly produced on the fifth day of the trial after some urging by the Court (Tr. p. 942), the prosecutor stating:

> "... I do have a handwriting report in which we had a handwriting expert look at some of the documents in this case. And I have a report on that. I would have shown it to the defendants if I thought it would be helpful in establishing their innocence so that I felt it was my obligation to do so.
>
> ... I just don't think the conclusions were conclusive enough to be helpful to any party in this litigation ..."

The analyst's report negated the prosecution's forgery theory. The government's expert had reported that the following documents, among others, "very probably" bore the genuine signature of Clyde Banks:

> The collateral loan application submitted to City Trust Co.
>
> The hypothecation agreements with Conn. Natl. Bank.

The collateral note, signature card and power of attorney to Westport Bank & Trust Co.

The collateral note to Merchant's Bank & Tr. Co.

The collateral loan note to Fairfield County Trust Co.

The retail installment contracts with General Motors Acceptance Corp.

The prosecution ignored its obligation to see that full disclosure is made at the trial of whatever may be in its possession which bears in any material way on the charges.

Berger v. *U. S.*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314.

The deliberate suppression by the prosecution, until the fifth day of trial, of its handwriting expert's report under the circumstances of this case constituted a denial of due process.

U. S. ex rel., Thompson v. *Dye,* 221 F. 2d 763;
U. S. ex rel., Meers v. *Wilkins,* 326 F. 2d 135.

"The suppression of evidence may be a denial of due process when it is vital evidence, material to the issues of guilt or penalty."

U. S. ex rel., Almeida v. *Baldi,* 195 F. 2d 815, 33 A.L.R. 2d 1407, cert. den. 345 U. S. 904, 97 L. Ed. 1341, 73 S. Ct. 639, reh. den. 345 U. S. 946, 97 L. Ed. 1371, 73 S. Ct. 828;
Pyle v. *Kansas,* 317 U. S. 213, 87 L. Ed. 214, 63 S. Ct. 177;
Mooney v. *Holohan,* 294 U. S. 103.

No disclosure of this vital evidence was made at pretrial conferences (Tr. pp. 936, 938). Had such disclosure

been made, it is reasonably certain that the defense would have required its production. If the prosecutor's conduct here does not constitute denial of due process, then the rule as expressed by Justice Douglas in *Brady* v. *State of Maryland,* 373 U. S. 83, 83 S. Ct. 1194, is meaningless for how may counsel request evidence the existence of which they are unaware?

> ". . . When there is substantial room for doubt, the prosecution is not to decide for the Court what is admissible or for the defense what is useful." *Barbee* v. *Warden,* 331 F. 2d 842, citing *Griffin* v. *U. S.,* 183 F. 2d 990, 993.

Here, as in *Thompson* v. *Dye,* 221 F. 2d 763, we have

> ". . . substantial evidence which should have been but never was submitted to the jury (the only tribunal entitled to pass upon it) . . ."

This was a postal inspectors' indictment. The government's handwriting expert was a member of the Chief postal inspector's staff. To require the defense to call this witness their own is repugnant to our adversary system. An analogous situation was presented in *Campbell* v. *U. S.,* 365 U. S. 85, where in an inquiry under the Jencks Act the Court refused to call an FBI agent, saying that the defendants could do so if they wished. Justice Brennan there wrote:

> "In the role of petitioners' witness, they would be groping in the dark in questioning him and they might be bound by his answers. As a witness called by the Government or even as the Court's witness, they would have a latitude in cross-examination to which the circumstances entitled them."

But even if, as the learned trial judge felt, it were true that the defense should have adopted the government

expert as their own without doing violence to fundamental due process, their failure to do so should not under the circumstances here presented penalize the defendants.

U. S. v. *Poole,* 372 F. 2d 645.

It appears (Tr. p. 2784) that defendants requested instruction "that if they (the prosecution) did put the handwriting expert on the stand he would have testified adversely to the Government's position." The trial judge contented himself on this point by charging that the government's expert was in court and could have been called by either party (Tr. p. 2633). Thus an undue burden was placed upon the defense as more clearly defined by counsel's cogent argument appearing at pages 2586/79 of the transcript.

(b)

False and misleading statements by Government counsel.

At pre-trial conferences the prosecutor represented that the issue of forgery was not in the case (Tr. pp. 877, 936, 937, 938). Defense counsel relied upon this representation and did not prepare handwriting testimony (Tr. pp. 937, 938). Government counsel represented that ". . . if the jury wants to make an inference that there was a forgery I am not going to stop them. *But I certainly will not argue it to the jury*" (Emphasis supplied) (Tr. p. 945). In summation, nevertheless (Tr. 2551, 2552) over defense objections and despite the admonition of the Court (Tr. 2551) he used these words: "*But I do argue, ladies and gentlemen of the jury, that there is evidence of forgery in this case.*"

It is here submitted that these unpardonable misrepresentations permitted to stand over defense objection, under the circumstances of this case constitute a raw denial of due process.

(c)

Prejudicial comments and instructions by the Trial Court.

In summation, the prosecutor told the jury, "I will say that we had a handwriting expert here who is sitting in the courtroom." Upon defense objections, the Court made the following comment (Tr. p. 2549):

> "The Court: Well, this is a matter that I will grant goes beyond the evidence. But I do think that it is fair to state, and I will take the responsibility of doing this, and I will suggest that this might terminate the debate on this point.
>
> At the request of defendant's counsel a handwriting expert who had examined certain documents at the request of the government did come down here at the request of the Court to be available to either side if they cared to call him and a report that he prepared was available to both sides.
>
> A decision was made by counsel on both sides—I had nothing to do with that—that that witness need not be called, and he was not called by either side, . . ."

In colloquy had in the absence of the jury (Tr. pp. 2580-2587), defense counsel argued that this comment was "irremedial error"; that tentative arrangements made during the course of this lengthy trial in the absence of the jury should not be "displayed to the jury in any way"; that the parties agreed or the lawyers agreed that the witness was not needed . . . it seems to me colud not fail to prejudice the defendants in view of the fact that it was in my judgment the strongest element in their defense and an element upon which we relied very, very, heavily; that it negated the entire force of defendant's argument."

This jury was not informed that the expert in question was the Chief Postal Inspector's expert, in the employ

of and under the control of the government. The Court's instruction (Tr. p. 2633) under these circumstances only served to magnify the well seeded error and prejudice.

Under these particular circumstances, the jury should have been informed of the government status of the handwriting expert, and charged that the failure of a party to call a witness in its employ and under its control may result in an inference that the testimony of such a witness would be unfavorable to such a party. *Peo.* v. *Moore,* 17 N. Y. —— A. D. 2d 880, cert. den. 83 S. Ct. 64, 371 U. S. 838, 9 L. Ed. 2d 74.

Defendant C. Emily owned a taxicab franchise in the Village of Larchmont, N. Y. and testified that the business was purchased for Clyde Banks because it was an "easy business" (Tr. p. 2315). It was planned to acquire "a group of cars, maybe four or five and put them under a leasing company" (Tr. p. 2321). ". . . because it was impossible for Clyde to own anything because of the constant pressure of his ex-wife, and it was a case that he always had to keep hiding whatever he had" (*Idem.*). When a vehicle was purchased, the bill of sale would be taken in the name of Banks as buyer, and registered in the name of the co-buyer (Tr. p. 2323). It is clear that the Court understood this testimony (Tr. p. 2322).

This witness had also testified that because of Clyde Banks, driving record, the insurance "would be at least five times or more the rate of an average motorist" if the cars were registered in his name (Tr. p. 2324).

Despite the clarity of this testimony, and although The Court had clearly indicated comprehension of its thurst, nevertheless the learned trial judge assumed the role of prosecutor and made the following damaging statement during the course of this witness' testimony (Tr. p. 2324).

"The Court: The thing that escapes me, and I just leave it entirely to counsel—it is not my function to

ask questions—but I don't quite see why these cars were taken in the name of Clyde Banks as a co-buyer for the reasons that Miss Freccia gave; in short, that the rate of insurance would be too great and pressure from his ex-wife was too great.

If that is so, why was it necessary to have hi mnamed as a co-buyer at all?''

It was immediately pointed out by defense counsel in lengthly colloquy (Tr. pp. 2326-2337) that objection made in the presence of the jury would be hazardous.

This statement of opinion by the Court, coming during the course of defendant's direct testimony was not only argumentative in nature, but it indicated to the jury that the Court entertained grave doubts and serious reservations as to the credibility and probity of this witness.

The trial judge over stepped the guidelines laid down in *Quercia* v. *U. S.*, 289 U. S. 466, 470, 53 S. Ct. 698, 699 adn his expression of doubt as to the probity of the only defense witness may well have been the controlling factor in the jury room.

This damaging statement by the Court did not serve to clarify any previous testimony, it could only be interpreted as an expression of judicial doubt and an invitation to argument. Its effect could not possibly have been missed by an intelligent juryman unaware of constitutional limitations upon a trial judge's role. Here, as in *U. S.* v. *Marzano,* 149 F. 2d 923, 926.

> ''. . . The judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials.''

In *U. S.* v. *Porter,* 386 F. 2d 270, it was held that a judge's comments on evidence went beyond permissible limits

where such could easily have been construed as an expression of his belief that defendant was guilty.

The liberal Federal rule is nicely expressed in *Billeci* v. *U. S.*, 184 F. 2d 394:

> ". . . in exceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence anymore that he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused."

It cannot here be said that the Court's expression of doubt and disbelief was harmless *dictum,* nor that its effect upon the jury did not weigh heavily in its determination. Here, as in *U. S.* v. *Sowards,* 339 F. 2d 401. The effect of the Court's statements was to destroy the defendant's testimony.

(d)

The loose application of evidentiary rules.

It was incumbant upon the trial judge "to analyze with meticulous care the evidence as to each defendant. " *U. S.* v. *Bufalino,* 285 F. 2d 408, 418.

As noted by Justice Fortas in *Dennis* v. *U. S.,* 384 U. S. 855, 875:

> "A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more

of the multiple defendants. See, E.g., United States v. Bufalino, 285 F. 2d 408, 417-418 (C. A. 2nd Cir. 1960). Under these circumstances, it is explicitly important that the defense, the judges and the jury should have the assurances that the door that may lead to truth have been unlocked."

But the chief inspector's report that the bank documents "very probably" bore the authentic signature of Clyde Banks remained locked away from the jury. And so the defendant Doeberl was found guilty by association.

"The trial of conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant.—

A defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch* v. *U. S.*, 336 U. S. 440, 450, 454.

About the worst that was said of the defendant Mastocciolo was that "He was friendly with Miss Freccia, with Emily Freccia, with Frank Doeberl" (Tr. p. 2565).

The defendant Frank Freccia was associated with his sister Emily Freccia in a real estate corporation (Tr. p. 2572). Without the hearsay testimony of Clyde Banks' former wife (Tr. p. 1782-1785 and a former girl friend Tr. pp. 1609, 1612, 1614, 1645) there was nothing to link this defendant with the crime as charged.

The defendant Emily Freccia was the wife of decedent Clyde Banks, named as a co-conspirator. She too was condemned by the hearsay testimony of these ladies, whom she had replaced in Banks' affection.

(e)

The Government failed to prove that Hodgkins disease was "fatal" as alleged in the indictment.

Count one, paragraph 6 of the indictment alleges that petitioners concealed the material fact that Clyde Banks suffered from "Hodgkins disease, a fatal and incurable condition."

On petitioner's motion to dismiss at the end of the government's case (Tr. 2179-2184) and again on their motion at the conclusion of the trial (Tr. 2781), government counsel was sustained in his untenable argument that it was not the prosecution's burden "to show that the disease Mr. Banks had was fatal and incurable" (Tr. 2790). But this was the very crux of the "scheme".

POINT II

The conviction under count eighteen of the indictment is so unjust as to require this Court's intervention.

While incidental use of the mails may in some cases be sufficient to support an indictment charging violation of Title 18 United States Code Section 1341, a more overt conspiracy is contemplated by Title 18 United States Code Section 371. In the latter case, the gravaman appears to be not merely incidental use of the mails to accomplish a "scheme", but a preconceived plot directed against the United States. There being no proof of a conspiracy directed against the United States, this catch-all count must fall.

CONCLUSION

This thirteen day trial with its suppressed evidence, misrepresentations, prejudicial comments and instructions and damaging hearsay, was one worthy of the Court of Star Chamber and this Court should grant certiorari and the order below should be reversed.

April 22, 1969.

Respectfully submitted,

WILLIAM L. DARROW,
Attorney for Petitioners.

APPENDIX

Judgment, United States Court of Appeals, 2nd Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of February one thousand nine hundred and sixty-nine.

Present: HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges,

HON. WALTER R. MANSFIELD,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

C. EMILY FRECCIA, a/k/a MRS. CLYDE BANKS, FRANK J. FRECCIA, a/k/a FRANK J. FRECCIA, SR., FRANK A. DOEBERL and JOSEPH B. MASTOCCIOLO, a/k/a JOE MASTO,
Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Order, United States Court of Appeals, 2nd Circuit.

31173

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

C. EMILY FRECCIA, a/k/a MRS. CLYDE BANKS; FRANK J. FRECCIA, a/k/a FRANK J. FRECCIA, SR., FRANK A. DOEBERL and JOSEPH B. MASTOCCIOLO, a/k/a JOE MASTO,

Defendants-Appellants.

A petition for a rehearing or in the alternative a motion to stay the issuance of the mandate having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied as to a rehearing but a stay of the issuance of the mandate pending application for a writ of certiorari, subject to the conditions of Rule 41 of the Federal Rules of Appellate Procedure, is granted.

It should further be noted, however, that petitioners' statement that after only two minutes of argument, they were informed by the panel that it had decided to affirm the judgment of the court below and that this precluded them from bringing an additional point to the panel's attenion is incorrect. Petitioners asked for twenty minutes

of time for argument and were granted twenty minutes, which they used. The panel had read the briefs prior to argument and petitioners were not cut off at the end of two minutes or at any other time. The point which petitioners claim they were precluded from calling to the attention of the panel was not considered important enough to include in the original brief on appeal. The panel's decision to affirm was not announced until petitioners' counsel was given full opportunity to complete his entire argument. At that time it was also pointed out to counsel that petitioners' complaint as to severity of sentence should be addressed to the district court under Fed. R. Crim. P. 35.

March 26, 1969.

ROBERT P. ANDERSON

WILFRED FEINBERG C.J.J.

WALTER R. MANSFIELD D.J.

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351-219—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1313

C. EMILY FRECCIA, A/K/A MRS. CLYDE BANKS; FRANK J. FRECCIA, A/K/A FRANK J. FRECCIA, SR.; FRANK A. DOEBERL AND JOSEPH B. MASTOCCIOLO, A/K/A JOSE MASTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1969. A petition for rehearing was denied on March 26, 1969. The petition for a writ of certiorari was filed on April 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government improperly brought into question the authenticity of certain signatures,

suppressed evidence thereon or otherwise misused such evidence.

2. Whether the trial court asked an improper question of a petitioner.

3. Whether the evidence supported the petitioners' convictions for mail fraud and conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted of mail fraud affecting banking institutions, car dealers and life insurance companies, and of conspiracy to commit these offenses, in violation of 18 U.S.C. 1341 and 371.[1] Concurrent sentences of imprisonment and total fines were imposed as follows: Emily Freccia, five years and $25,000, plus five years' probation on count 18; Frank Freccia, four years and $15,000; Doeberl, a year and a day and $2,500; Mastocciolo, one year and $2,500 (R. 1–12, 61–68). The court of appeals affirmed per curiam.

The evidence establishing the mail fraud showed that in July 1961, Clyde Banks, a resident of Greenwich, Connecticut, was found to be suffering from Hodgkin's disease, an incurable malignant disorder involving the lymphoid system (Tr. 98, 101, 128, 137).[2] The average life expectancy of an individual suffering

[1] The indictment consisted of seventeen substantive counts and a conspiracy count. Substantive counts 5 and 13 were dismissed by the government at the close of the government's evidence. Verdicts of guilty against all petitioners were rendered on the remaining 14 counts.

[2] Banks, who was deceased at the time of the return of the indictment, was named as a co-conspirator (R. 10).

from the disease has been found to be forty-three months from the time of diagnosis (Tr. 138). By August 1962, Banks appeared to have passed into "stage three" of the disease, which indicated that he would probably be dead within twelve to twenty-four months (Tr. 143, 171, 174).

Petitioners Frank and Emily Freccia, brother and sister, who had brought Banks to the attending physician, exhibited some curiosity about his condition, but the doctor refused to give them any information because they were not members of the family (Tr. 296–302). In June 1962, the Freccias learned from Banks' former wife that he had only about a year to live. At that time, Miss Freccia suggested to the former wife that she take out an insurance policy of forty to fifty thousand dollars on Banks' life (Tr. 1759–1762).

A number of loan transactions took place thereafter in which Banks would appear as a co-signer on a note with Miss Freccia, with provision for insurance on Banks for any unpaid balance due on the loan in the event of his death. Miss Freccia would deposit in the institution an amount equal to the amount of the loan, leaving the passbook as security. The proceeds of the loans would be deposited to the credit of a realty company operated by Frank and Emily Freccia (Tr. 542–554, 649–652, 680–692, 727–733, 789–793, 843–861, 882–887, 993–998, 1001–1024, 1147–1167). Similar transactions took place, in which petitioner Mastocciolo also participated as a co-signer with Banks, in the purchase of automobiles. The contracts contained an insurance clause providing that the installment loan would become fully paid on Banks' death. Five

Cadillacs, four Chevrolets, one jeep and one school bus were thus acquired by petitioners (Tr. 1179–1190, 1308–1317, 1349, 1488, 1514).

The exact extent to which Banks himself, or Doeberl representing himself to be Banks, entered into these transactions was not clear. The two men had a strong physical resemblance (Tr. 239, 1102), although their manner of speech was entirely different (Tr. 549, 1596–1597). As to some of the transactions, there was positive testimony that Doeberl represented that he was Banks and presented identification papers of Banks (Tr. 553–554, 882–885, 1189). Some of these appearances took place when Banks was in the hospital (Tr. 89; Govt. Exh. 1). An examination of the signatures on the loan documents by a handwriting expert of the Postal Department led to inconclusive results. Although the report was made available to petitioners during trial and the expert was present at their request, neither side called him as a witness (see *infra,* pp. 6–10).

Banks supposedly was married to Miss Freccia in the fall of 1963, at which time he moved into a basement apartment at the rear of the Freccias' place of business in Greenwich (Tr. 1306, 1603–1604, 1887–1888, 2102). On May 29, 1964, Banks died (Tr. 1654, 1766). Miss Freccia told an employee of one of the lending institutions, who called after seeing a notice in the paper, that Banks' death was very sudden and a great surprise to her (Tr. 1301–1304).

Following Banks' death, an attorney representing the Freccias wrote a number of letters endeavoring to recover the collateral which had been pledged on the

loans in question (Tr. 1847, 1895, 1985; Govt. Exhs. 50, 87, 89, 152). The mails were also used for various other dealings between petitioners and the lending institutions (Govt. Exhs. 28–31, 43, 49, 58–62, 64, 74, 84–91, 96). A business acquaintance of petitioners, who had been asked by Miss Freccia to intercede at one of the banks to secure the release of monies claimed by her, testified that Miss Freccia admitted that she had used Banks' name in some loan transactions and had "beat" the lenders (Tr. 2088–2103). Doeberl admitted that he had posed as Banks on some loans (Tr. 2085–2087).

ARGUMENT

1. Petitioner's principal contention (Pet. 6–10) is that the government trial counsel suppressed evidence, misrepresented his case and made improper argument concerning the authenticity of certain purported signatures of Banks. The record wholly refutes this claim.

The exploitation of this supposed issue began on the fifth day of the trial. An officer of one of the lending institutions that had made loans to petitioners testified that on January 31, 1964, Miss Freccia and a person introduced as "Clyde Banks" talked with him about a loan and that "Banks" signed a note in his presence. He identified "Banks" as petitioner Doeberl (Tr. 882–888).

Defense counsel objected that this amounted to saying that the note was a forgery, without charging anyone with it.[3] The government attorney replied

[3] The officer further testified, however, that delivery of the note to the bank took place on a later day, and that he therefore could not say that it was the same note which he saw "Banks" sign (Tr. 886–887).

that forgery was a state offense and that the law did not require that a defendant be charged with every crime he had committed (Tr. 888–889). A second defense counsel had stated that prior to trial government counsel had commendably supplied particulars and had made disclosures helpful in preparation of the defense, but that the defense had relied on his representation at the time that the government was not calling handwriting experts and that forgery was not claimed. Defense counsel urged the court that the government should be required to say if the signatures were forgeries and, if so, then the defense should be accorded an opportunity to retain and prepare handwriting experts to rebut that contention (Tr. 936–938).

Government counsel responded that he had several conversations with defense counsel before trial and disclosed nearly all of the government evidence. He told counsel that the government would offer no handwriting testimony; that the indictment alleged a misrepresentation by Doeberl that he was Banks, but made no allegation of forgery. He further stated that a handwriting expert had inspected the various documents and had made a report which he would be glad to show the defense; that he had not made this report available earlier because he did not think the conclusions therein expressed were sufficiently positive to help either side; and that the witness on the stand had not testified that the note had been forged, but that he had seen Doeberl sign a document and that Miss Freccia had come back later with a note which may have been the same one and may have been another

(Tr. 941–944). Government counsel concluded (Tr. 945):

> I made no allegation of forgery. I am not going into that question. If the jury wants to make an inference that there was a forgery I am not going to stop them. But I certainly will not argue it to the jury.

He then turned over the report of the handwriting expert (Court Exh. 20).

In overruling the defense objection, the court stated that it was "impressed with the frankness and candor of the Government's statement", which was "fair and specific", and that the defendants could act accordingly in preparing any defense that they might have (Tr. 947–949). Petitioners later requested that the government bring the expert to the trial, which was done (Tr. 1373–1376). Neither he nor any other handwriting expert was placed on the stand.

In summation, counsel for Miss Freccia and Doeberl denounced the government for claiming forgery but not producing a handwriting expert to prove the charge, and demanded to know the whereabouts of the expert who had examined the signatures, claiming that the failure of the government to call him as a witness established that no petitioner forged Banks' signature.[4] In reply, the Assistant United States Attorney said (Tr. 2549): "I will say that we had a handwriting expert here who is sitting in the court room." Counsel

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[4] Defense counsel argued in part (Tr. 2532–2535):

"If there was any question that Mr. Doeberl ever signed his name in lieu of Clyde Banks, or that Miss Freccia did or that

objected that there was no evidence as to this. The following then transpired:

> The COURT. Well, that is a matter that I will grant goes beyond the evidence. But I do think it is fair to state, and I will take the responsibility of doing this, and I will suggest that this might terminate the debate on this point.
>
> At the request of defendant's counsel a handwriting expert who had examined certain documents at the request of the government did come down here at the request of the Court to be available to either side if they cared to call him and a report that he prepared was available to both sides.
>
> A decision was made by counsel on both sides—I had nothing to do with that—that wit-

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Mr. Masto did or Mr. Frank Freccia did, the Government would have them in here for forgery. At the very least you would have heard from a United States Postal, probably a senior handwriting examiner—and they can call upon the FBI for help or any one else they choose to call for in connection with help to have evidence brought before you that these were indeed forgeries or questionable signatures."

* * * * *

"Where is the man? Where is he? The acknowledged handwriting expert the Government saw fit to call upon to do this work and then cheerfully ignored this trial? Why call almost forty witnesses and leave him home? Do you know why? They didn't like what he was going to say and that's why they left him home."

* * * * *

"And once again, just like the marriage, you don't hint that a man is a forger. If you are going to accuse him you accuse him. You don't say we think he was almost a forger or maybe he was a forger. * * * Where is your Postal handwriting expert? Bring him in here. That's how you do it."

ness need not be called, and he was not called by either side.

Now that, I think, is in substance what the situation is about. I will suggest that if counsel think my statement of it is fair that they leave it as it is.

Mr. HEYMAN. I think it is perfectly fair, your Honor.

Next, Mr. McNamara made a large point about—first I might say something about handwriting. Of course, not every forgery can be detected. Handwriting experts are not foolproof. * * *

And only Mr. Purdy could tell that that wasn't his signature.

Mr. MCNAMARA. May it please the Court, I think this is clearly now out of order. These people are not charged with forgery. Any suggestion that they are guilty of it is most improper.

Mr. HEYMAN. This matter was injected——

The COURT. I will overrule the objection, but I will state to the jury that forgery is not a crime charged in this case. You will not be called upon to make any determination of anything except the crimes charged in the indictment.

Mr. HEYMAN. That is correct. But I do argue, Ladies and Gentlemen of the jury, that there is evidence of forgery in this case.

Mr. MCNAMARA. May it please the Court, that is just the contrary of what your Honor just said.

Mr. HEYMAN. No, I don't think it is at all.

Mr. MCNAMARA. I don't know how else you can say that, Judge.

> The COURT. I will ask counsel, if possible, to avoid the use of that term. I think it may be possible to describe anything that is in evidence in a way that does not employ the use of a reference to a crime which is not here charged.
>
> Mr. HEYMAN. So there is some evidence, Ladies and Gentlemen, that those signatures that were on the cards, that were submitted as exhibits for the defendants, were not authentic signatures. [Tr. 2549–2551.]

Later, in the absence of the jury, objection was made to these proceedings. The court said that it felt called upon to make a statement, but that if the question was not handled fairly, he would welcome any suggestion. Defense counsel said that the error could not be remedied, whereupon the court said that it would leave the matter as it stood (Tr. 2585–2589).

As the foregoing demonstrates, the government was candid about its evidence, withholding nothing of benefit to the defense. When the report was made available to petitioners, the estimate of its limited significance was seen to be justified. This case, in short, is hardly comparable to the failure to disclose the confession of a co-defendant that it was actually he who had committed the homicide, which this Court found to be violation of due process in *Brady* v. *Maryland*, 373 U.S. 83. Moreover, defense counsel, with full opportunity to do so, called neither the postal expert nor any other handwriting expert as a witness. Instead, he persisted in pursuing the question of whether there was forgery in his summation, in an obvious attempt to discredit the government's case. In these

circumstances, the limited government response was invited and hardly prejudicial. The court's statement in this regard was also free of error. It accurately answered counsel's demand to know where this expert was—*i.e.*, that he was in the courtroom, available to either party.

We note finally that this entire issue has been blown up all out of proportion to its actual importance. The essence of the fraud perpetrated by petitioners was to insure the amounts of loans and unpaid balances on automobiles on the life of Banks, with knowledge that he would shortly die from an incurable disease,[5] so that these loans would not have to be repaid and the automobiles would not have to be fully paid for. The evidence showed that as a step to achieve this fraud, Doeberl on occasion misrepresented himself as Banks. The question of forgery was unrelated to the case and was interjected by defense counsel.

2. Prejudicial error is also claimed because of a question by the court during Miss Freccia's testimony. She had testified that she owned a taxicab franchise in a neighboring town, and had purchased the business for Banks because it was an easy business; she explained that it was undesirable for Banks to own anything in his own name because of financial pressure from his ex-wife and because his insurance would be higher in view of his past record. For this reason, she said, the bills of sale were taken in Banks' name,

[5] Petitioners to the contrary, the evidence adequately sustained the allegation in the indictment that Hodgkin's disease is incurable (Tr. 98, 101, 128, 137).

but registered in the name of the co-buyer (Tr. 2315–2323). The court then said (Tr. 2323):

> The thing that escapes me, and I just leave it entirely to counsel—it is not my function to ask questions—but I don't quite see why these cars were taken in the name of Clyde Banks as a co-buyer for the reasons that Miss Freccia gave; in short, that the rate of insurance would be too great and pressure from his ex-wife was too great.
>
> If that is so, why was it necessary to have him named as a co-buyer at all?

Her counsel asked her to explain that, to which Miss Freccia replied, "Clyde wanted it that way. Clyde wanted his signature and his name." (Tr. 2324–2325).

At the recess which followed, her counsel said that the jurors might take it as an expression of the court's doubts, which he was sure the court would not want (Tr. 2328). The court said that he thought that counsel or the witness had overlooked the question, and believed it should be asked while the matter was fresh in everybody's mind. He considered her answer to have been direct and responsive; but if counsel thought the jurors might attach particular significance to the question because it was asked by the court, he would be glad to give a cautionary instruction (Tr. 2331–2337). At counsel's suggestion, this was done at a subsequent time, so as not to emphasize the matter (Tr. 2383–2386).

Nothing in the record supports an inference that the judge was attempting to assume the role of an advocate or to cast doubt on the witness' testimony. The court sought only to clarify a matter which was

somewhat obscure. "The judge conducting a jury trial in a federal court is 'not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'" *Quercia* v. *United States,* 289 U.S. 466, 469; *Glasser* v. *United States,* 315 U.S. 60, 82.

3. The evidence sustained the existence of a conspiracy by petitioners to use the mails to defraud. All were shown to have had a part in the scheme—Miss Freccia, by her active participation in obtaining the loans; Frank Freccia, by receiving the proceeds of such loans into the partnership account; Doeberl, by masquerading as Banks; Mastocciolo, by his participation in the motor vehicle purchases.

Mail fraud was properly charged. The fact that petitioners themselves may not have mailed certain of the "count letters" is not significant. Where one acts with knowledge that use of the mails will ordinarily follow, or such use can reasonably be foreseen even though not actually intended, he causes the mails to be used. *Pereira* v. *United States,* 347 U.S. 1.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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